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5 UNITED STATES DISTRICT COURT  
6 EASTERN DISTRICT OF WASHINGTON  
7

8 UNITED STATES OF AMERICA

9 Plaintiff,

10 v.

11 MAXIMINO OSUNA-  
SAMANIEGO,

12 Defendant.  
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NO. CR-04-167-RHW  
CV-07-143-RHW

**ORDER DISMISSING  
DEFENDANT'S MOTION  
UNDER 28 U.S.C. § 2255  
PURSUANT TO RULE 4**

14 Before the Court is Defendant Maximino Osuna-Samaniego's Motion for  
15 Time Reduction by an Inmate in Federal Custody Under 28 U.S.C. § 2255 (Ct.  
16 Rec. 86). Defendant currently is incarcerated at the California City Correctional  
17 Center. Defendant pleaded guilty to Possession with Intent to Distribute 50 Grams  
18 or More of Actual Methamphetamine, in violation of 21 U.S.C. § 841(a)(1) and  
19 (b)(1)(A), (Ct. Rec. 56), and was sentenced by this Court to 70 months'  
20 incarceration, 3 years supervised release, and a \$100 special penalty assessment  
21 (Ct. Rec. 64). Judgment was entered on January 23, 2006. *Id.* Defendant filed an  
22 appeal on January 20, 2006, and the Ninth Circuit affirmed this Court's judgment  
23 on December 27, 2006 (Ct. Rec. 84). Defendant's motion to vacate, set aside, or  
24 correct sentence was filed on May 4, 2007 (Ct. Rec. 86).

25 Pursuant to Rule 4 of the Rules Governing Section 2255 Proceedings for the  
26 United States District Courts ("Rule 4"), the Court must independently examine a  
27 Section 2255 motion to determine whether summary dismissal is warranted.  
28 Dismissal is appropriate if the movant's "allegations, viewed against the record,

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1 either fail to state a claim for relief or are so palpably incredible or patently  
2 frivolous as to warrant summary dismissal.” *Marrow v. United States*, 772 F.2d  
3 525, 526 (9th Cir. 1985); *see also United States v. Leonti*, 326 F.3d 1111, 1116  
4 (9th Cir. 2003). Viewing the record under this standard, the Court finds it  
5 appropriate to dismiss the Defendant’s motion.

6 Defendant asserts that his sentence should have been reduced under U.S.S.G.  
7 § 5.K2.0 because he accepted a final deportation order. He also argues that he  
8 should receive a reduction in his offense level because, as an illegal alien, he is not  
9 eligible for certain community confinement programs and cannot be housed in a  
10 minimum security facility. *See* 18 U.S.C. § 3625(c).<sup>1</sup> At sentencing, the  
11 Defendant asked for a reduced sentence based on § 3553(a) factors such as his low  
12 criminal history, his limited education, and his efforts to find work upon his arrival  
13 in the United States.

14 These claims must fail because the Defendant failed to raise them at  
15 sentencing or through direct appeal. Nonconstitutional sentencing errors not raised  
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17 <sup>1</sup> Defendant alternately casts his sentencing error claim as an equal  
18 protection or due process violation. This claim may be construed as a federal  
19 prisoner’s challenge to the execution of his sentence. *See* 28 U.S.C. § 2241. These  
20 constitutional claims, however, fail on the merits. The Ninth Circuit has held that  
21 the Bureau of Prisons’ determination that prisoners with immigration detainers are  
22 not eligible for the community confinement benefits outlined in 18 U.S.C. §  
23 3625(c) is not a violation of due process or equal protection. *See McLean v.*  
24 *Crabtree*, 173 F.3d 1176, 1184-86 (9th Cir. 1999) (holding that the Bureau of  
25 Prisons’ exclusion of prisoners with immigration detainers from eligibility for  
26 sentence reduction or community confinement does not violate equal protection or  
27 due process), *cert. denied*, 528 U.S. 1086 (2000).  
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1 on direct criminal appeal are deemed waived for purposes of a section 2255  
2 proceeding. *See United States v. Schlesinger*, 49 F.3d 483, 484-85 (9th Cir. 1995).

3 Accordingly, **IT IS HEREBY ORDERED** that pursuant to Rule 4, the  
4 Defendant's Motion for Time Reduction by an Inmate in Federal Custody Under  
5 28 U.S.C. § 2255 (Ct. Rec. 86) is **DENIED**.

6 **IT IS SO ORDERED.** The District Court Executive is directed to enter this  
7 Order, forward copies to counsel and the *pro se* Defendant, and **close the file**.

8 **DATED** this 13<sup>th</sup> day of November, 2007.

9 *S/ Robert H. Whaley*

10 ROBERT H. WHALEY  
11 Chief United States District Judge  
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